

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SANDRA NYLAND and CHARLES NYLAND,

Plaintiffs-Appellants,

v

KMART,

Defendant-Appellee,

and

WILSON-64, L.L.C.,

Defendant.

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UNPUBLISHED

March 17, 2011

No. 295464

Muskegon Circuit Court

LC No. 09-046520-NO

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

In this premises liability action, plaintiffs Sandra Nyland and Charles Nyland, husband and wife, appeal as of right the trial court's order granting summary disposition in favor of defendant, Kmart Corporation. We reverse and remand.

This case presents an unusual fact scenario. On March 11, 2007, plaintiff Sandra Nyland was injured when she fell on the sidewalk outside the front entrance to Kmart at about 9:00 a.m.<sup>1</sup> She alleged that there was an approximately three foot area of ice immediately in front of the entrance to the store that was completely hidden under a layer of sand and that she discovered the ice only after she was on the ground after falling. The incident report prepared by defendant's employee after plaintiff fell was consistent with plaintiff's testimony. The employee's report stated that he inspected the area after the plaintiff's fall and that he found "ice

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<sup>1</sup> As a result of the fall, plaintiff tore her rotator cuff and underwent surgery and physical therapy.

just outside of the door [that] was covered by a layer of dirt.” It also stated that the condition formed “overnight” due to “temperature changes.”

Defendant’s loss prevention manager testified that there was an eave or sign over the area that dripped water allowing water to accumulate in that small area and then to freeze when the temperature dropped. He testified that when he arrived at about 8:00 that morning he believed the area was only wet, not icy. He also testified that there was naturally-accumulating dirt covering the area, not sand, and that no sand had been intentionally placed over the area. He agreed that about an hour before plaintiff fell he “didn’t see or notice anything that was an obvious danger that a patron walking in would have to be concerned about.” The manager conceded that when he went to the site of plaintiff’s fall after she fell he found “a slippery area,” but testified that he did not move the dirt to see if there was ice below it. He also testified that while the store typically salts icy areas, the store was out of salt that day. Finally, he testified that it was store protocol to take a photo of the relevant area when a customer slips and falls, but that he could not locate any photo taken that morning in response to plaintiff’s request for production.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the grounds that the hazard that caused plaintiff to fall was open and obvious and that there were no special aspects present making it unavoidable or unreasonably dangerous. The trial court granted the motion. We review that decision de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004). In doing so, we consider the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat’l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate where there is no genuine issue regarding any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

It is undisputed that the ice was covered and not visible. Whether one adopts plaintiff’s testimony that the area was covered in sand, or the testimony of defendant’s employees that the area was covered by a “layer of dirt,” the record does not support the conclusion that, as a matter of law, the ice was visible by casual observation. Typically, if a hazard cannot be seen, it cannot be construed as open and obvious. The evidence agrees that no one discerned the presence of the ice before plaintiff fell.

The parties do not dispute that the weather was sunny, that it had not snowed for several days and, most important, that there was no snow or ice anywhere in the parking lot or walkways, other than the patch of ice under the dirt. Whether the dirt was placed to cover the ice specifically, or came to cover it accidentally, when plaintiff encountered the soil, the danger of slipping on an icy surface was simply indiscernible. Moreover, unlike the conditions described in *Ververis v Hartfield Lanes*, 271 Mich App 61; 718 NW2d 382 (2006), the existing weather conditions afforded no warning that potentially slippery patches of ice endangered patrons entering the store.

One can certainly argue that it would have been more prudent to walk around the dirt-covered area, as the dirt may have suggested the possibility that there was something different about the area. Indeed, plaintiff conceded at her deposition that had she noticed the sand, she would likely have walked around it because “[she] would have thought there would have been a

reason for it to be there.” Plaintiff’s testimony in this regard is clearly relevant to the existence of comparative negligence as she admitted that she did not notice the dirt-covered area and that if she had she would have avoided it even though she was not aware of any specific hazard. However, this arguably insufficient level of subjective attention does not render the hidden ice open and obvious as a matter of law. “When deciding a summary disposition motion based on the open and obvious danger doctrine, ‘it is important for courts . . . to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff.’” *Watts v Michigan Multi-King*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2010), slip op at 3, quoting *Lugo*, 464 Mich at 523-524. As we stated in *Novotney v Burger King*, 198 Mich App 470, 475; 499 NW2d 379 (1993), “it is not relevant to the disposition of this matter whether plaintiff actually saw the [hazard].” Rather, the question is whether “the nature of the [hazard was] discoverable on casual inspection.”<sup>2</sup> *Id.* The mere presence of sand or dirt in an otherwise snow and ice free area does not suggest the presence of underlying ice. Nor does a patch of dirt or sand on a sidewalk, standing alone, constitute an objectively open and obvious danger.

Given our ruling, we need not address plaintiff’s alternative argument that special circumstances existed concerning the dangerous condition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Elizabeth L. Gleicher  
/s/ Douglas B. Shapiro

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<sup>2</sup> Indeed, to the extent a factfinder could conclude that the dirt or sand was placed on the ice deliberately, a reasonable factfinder also could conclude that the defendant’s actions concealed, albeit inadvertently, what would have otherwise been an open and obvious icy condition.